UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Clovis, California)

MESCOR, INC. and SIERRA MOUNTAIN ELECTRIC CO., INC. d/b/a ALL CITY ELECTRIC

Joint Employers

And Case 32-RC-5227

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 100, AFL-CIO

Petitioner

DECISION AND ORDER

Mescor, Inc., and Sierra Mountain Electric Co., d/b/a All City Electric, herein called the Joint Employers, are related businesses with their principal place of business located in Diamond Springs, California. All City Electric is engaged in the business of electrical contracting. International Brotherhood of Electrical Workers, Local Union 100, AFL-CIO, herein called the Petitioner, filed a petition with the National Labor Relations Board, herein called the Board, seeking to represent a unit, herein called the Unit, consisting of all full-time and regular part-time electricians and electrician helpers, including technicians, mechanics 2, mechanics 1, and helpers, employed by the Joint Employers in Fresno, Madera, Kings, and Tulare counties; excluding office clerical employees, guards and general foremen, foremen, and supervisors as defined in

the National Labor Relations Act, herein called the Act. A hearing officer of the Board held a hearing in this matter.[1]

The Joint Employers contend that the instant petition should be dismissed because of the imminent cessation of the only construction project involving the Joint Employers within the geographical scope of the Unit, and because the current employees at the construction project do not have a reasonable expectation of future employment. As discussed below, I have concluded that the record evidence supports the Joint Employers' contentions. I, therefore, find that the instant petition should be dismissed. To provide a context for my discussion of the issues, I will first briefly describe the nature of the work performed by All City Electric at the only construction project that it currently has that is located inside the geographical scope of the Unit sought by the Petitioner. Then I will discuss the status of that construction project relative to the scheduled completion date for the project and the employment status of the All City Electric employees after the construction project is completed. Finally, I will present the facts and reasoning that supports my conclusions in this matter.

THE FACTS

At the time of the hearing, All City Electric was engaged as the electrical subcontractor at a remodeling project known as the Winco Foods Project located in Clovis, California. The project essentially involves the demolition and remodeling of the interior of an existing building in order to open for business as a Winco Foods Store, a large grocery store chain. All City Electric is responsible for all of the electric installation work on the project.

[1] The parties gave oral arguments at the end of the hearing, and neither party filed a post-hearing brief.

The Winco Foods Project started in about October 2003, and is scheduled to be completed on or before April 28, 2004. The completion date represents the date when the general contractor must surrender the building to the storeowner. All City Electric has completed approximately 85 percent of the electrical work that it was contracted to provide at the project and, according to Michael Meschi, the owner and CEO of the Joint Employers, All City Electric must finish its work at the project by April 28th. In this regard, the evidence shows that All City has not requested any extension of time to complete any part of its electrical work at the project and that it is extremely rare for general contractors to grant extensions to subcontractors that are beyond the general contractor's deadline for completing the project.[2] According to the evidence presented at the hearing, as of the date of the hearing, the entire Winco Foods Project was on schedule to be completed on or before April 28, 2004.

There are approximately 28 All City Electric employees working at the Winco Foods Project.[3] According to Michael Meschi, all of the project employees are temporary employees, and they will all be terminated upon completion of the project. Meschi testified that All City Electric generally terminates all of its field electricians

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[2] At the hearing, the Petitioner offered testimony from an employee of All City Electric that purportedly establishes that All City Electric requested an extension of time to complete its part of the project. According to the employee he saw a note on a scratch pad in the general contractor's trailer that was supposedly prepared by the All City Electric field manager. The date and circumstances of this incident were not disclosed, nor did the witness explain why he believes the note was prepared by the field manager. The note allegedly read, "All City asking for extension", however, the witness never asked the field manager about the note. Thus, it is evident that the witness was merely speculating about the meaning of the note and his testimony is insufficient to establish that the note related to an "extension of time" versus for example a request for "extension rings" or "extension boxes". The witness' testimony is also insufficient to establish that the note was even prepared by All City Electric. In any event, his testimony fails to rebut the documentary and testimonial evidence presented at the hearing that All City Electric will complete its part of the work at the Winco Foods Project by April 28, 2004.

[3] Mescor, Inc. technically employs all of the Joint Employer' employees and it supplies employees to All City Electric. It also provides payroll services to All City Electric.

upon completion of a project, unless there is another project in the area and there are positions available. He also testified that, on occasion, All City Electric might offer exceptionally skilled electricians opportunities to travel to jobsites located away from the area where they live. The frequency of this occurrence was not established, but All City Electric generally avoids making such offers to its electricians because the company incurs the cost of paying for the employees' lodging. Meschi testified that All City Electric is only willing to incur these costs when they cannot find local electricians with the necessary skill level to accomplish the particular job tasks. Thus, it is the company's practice to hire temporary employees who live in the area where the particular project is located.

According to Meschi, none of the electricians at the Winco Foods Project will be retained after the project is completed because the company has no other projects in the area, nor, is the company bidding on any projects in the geographical scope of the Unit.[4] In fact, since 1992, All City Electric has only worked on three projects in the geographical scope of the Unit, not including the Winco Foods Project, and the last time it did so was in 1995.[5]

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[4] The scope of the Unit corresponds to the counties located within the jurisdictional boundaries of the Petitioner.

[5] Meschi testified that All City Electric tries to limit its "marketing area" to locations that are within one and a half hours of Sacramento, California, because most of the company's field managers and core employees reside in and around the Sacramento area and it is therefore logistically prohibitive to go beyond that area. The company also performs work in the San Luis Obispo/Morro Bay area because one of the project managers recently moved to San Luis Obispo. There is evidence that, in the past, All City Electric bid on jobs or performed work on projects that were located well beyond the company's "marketing area". Meschi testified that All City Electric will occasionally take work beyond the marketing area if its field managers are willing to travel to the jobsites and if it makes economic sense to do so. The record evidence establishes, however, that the vast majority of projects that All City Electric has performed since 1992 are generally located within its marketing area. Thus, there is no basis for finding that the Joint Employers have any plans to perform any work within the geographical scope of the Unit in the foreseeable future.

ANALYSIS

It is clear under existing Board precedent that when an employer's operations are scheduled to wholly terminate within several months of the date of the representation hearing that no useful purpose is served by directing an election. *Davey McKee Corporation,* 308 NLRB 839 (1992); See *Fish Engineering & Construction Partners, Ltd.,* 308 NLRB 836 (1992).

In the instant case, the record evidence supports the Joint Employer's contention that the Winco Foods Project will be completed, or substantially completed, by about April 28, 2004, at which time all of the electricians will be terminated. Given that the project is on schedule to be completed in about two months, and that All City Electric has already completed about 85 percent of its contracted work, there is no basis for proceeding to election. In addition, All City Electric has no other ongoing construction projects that would be covered by the petitioned for unit, and the Employer has no bids pending for such work. Based on the foregoing, I conclude that it would serve no useful purpose to conduct an election at this time. I shall, therefore, dismiss the petition in this matter. However, should the petitioned-for unit remain in existence for a substantially longer period of time than is now anticipated or should the Joint Employers acquire additional construction projects within the geographical scope of the Unit covering the classification of employees described in the petition, I will entertain a motion by the Petitioner to reinstate the petition.

Respondent's Post-Hearing Motion to Re-open the Record

As stated above, I have concluded that the Petitioner did not present evidence at the hearing that rebuts the Joint Employer's evidence that the entire Winco Foods

Project would be completed by April 28, 2004. On March 4, 2004, two days after the hearing closed, the Petitioner sent two faxes to the Region. In these faxes, the Petitioner requested that the record be re-opened so that it can have six employees testify regarding the facts set forth in the written statements from these individuals that were introduced into evidence in this case. Second, Petitioner also states that it now has a neutral expert witness who could testify regarding his assessment of how much work remained to be done n the project and the likelihood that the project would be completed by April 28, 2004. On March 5, 2004, the Petitioner faxed a letter to the Region, which is purportedly from the neutral expert. The "expert's" letter is dated March 5, 2004, and is under the letterhead of an entity called Industrial Electric Digital Systems Group, Inc. This letter, which is hearsay evidence, states that the author did a walk through of the project and "briefly" looked at six categories of electrical work being performed on the project. The letter gives the author's assessment of electrical work that has and has not yet been performed on the project. The author of the letter concludes that the job is only 35%-40% complete and estimates that it would take a work force of 15 to 18 good men a month to a month and a half months to get the job back on schedule. The letter does not state the date on which the author visited the work site, and the Union 's fax does not explain why it could not have secured and presented such evidence at the hearing. I also note that there is no indication that the Union faxed or otherwise served its "motion" to re-open the record on the Employer.

Section 102.65 of the Boards Rules and Regulations addresses post-hearing attempts to introduce additional evidence. Pursuant to this rule, a party wishing to have the record re-opened must serve its motion to re-open the record on the other parties in

the case. Petitioner failed to do so. Furthermore, Section 102.65(e)(1) states that a motion to re-open the record to admit additional evidence must specify the error alleged to require the re-opening of the record, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, the reasons why the evidence was not presented previously, and what result it would require if the evidence were adduced and credited. The Petitioner's submission does not provide the information required under the Board's rule for re-opening the record. I also note that Section 102.65(e)(1) states that only newly discovered evidence, or evidence that should have been, but was not, admitted during the hearing, may be admitted into evidence through a re-opening of the record. Here, Petitioner has not established that its "expert" testimony is newly discovered evidence that could not have been secured in time to be presented at the hearing.[6] As the Petitioner's submission does not meet the criteria established by the Board for re-opening the record, I have concluded that the record will not be re-opened and the Petitioner's motion to re-open the record is denied.

Even assuming that the Petitioner's proffered evidence were made a part of the record, I conclude that it would not change my decision in this case. First, I find that the letter from the alleged neutral expert fails to rebut or even directly contradict the

[6] Petitioner argues that it was wrongfully denied the opportunity to have the six employees testify at the hearing, because the hearing officer told the Petitioner prior to the hearing that the testimony of the employees was not necessary and that the Petitioner could introduce the written statements from those employees. Under Section 102.65(e)(1), an otherwise properly filed motion for reconsideration may be granted if the evidence at issue should have been admitted into evidence at the hearing. Even assuming, but without finding, that the hearing officer's pre-hearing comments prevented Petitioner from presenting these witnesses at the hearing, I conclude that Petitioner has still not met the requirements of Section 102.65(e)(1). Petitioner failed to include the information required in Section 102.65(e)(1) and failed to serve the motion on the Employer. I also note that the written statements of the witnesses, though hearsay, were admitted at the hearing without objection and are part of the record in this case. Moreover, as explained below, I have concluded that the evidence presented by these witnesses does not support Petitioner's contentions and that even if the six witnesses testified consistent with their written statements, that testimony would not have changed my decision in this case. Therefore, Petitioner has not established that it was prejudiced by any actions taken by the hearing officer.

evidence introduced at the hearing that the Winco Foods Project will be completed on April 28th. The letter was written by an unidentified person whose credentials are not disclosed, except for the author's self-serving conclusion that he/she "specialize(s) in these projects." The author also states that he/she performed a "walk thru" of the project and "briefly" looked at various aspects of the construction work, on an undisclosed date, and he/she concludes that the project was only about "35% to 40% complete". Based on these representations, it is impossible to conclude that the "walk thru" was performed: (1) during a relevant period of time; (2) in a reliable manner; and/or (3) by a person who is qualified to make the assessments included in the letter. Moreover, the author of the letter stated that, as of a date not identified in the letter, the Employer would need a crew of 15-18 good men, working a month to a month and a half to get the project back on schedule. According to the record, as of the date of the hearing, the Employer had a crew of 28 employees working on the project. Therefore, the opinion expressed in the letter is insufficient to establish that the project will not be completed, or at least substantially completed, by April 28, 2004.

Second, with regard to the six employee witnesses the Petitioner wishes to present if the hearing were re-opened, I note that at the hearing, the Petitioner attempted to establish that some of the employees of All City Electric were told that their employment with All City Electric would continue after the Winco Foods Project was completed. In this regard, the Petitioner introduced testimony from an employee of All City Electric that on January 21, 2004, when he was hired, he was informed by the field manager that he could continue to work for All City Electric after the completion of the project because the company had other local work and work out of the area. The

Petitioner also introduced, without objection, hearsay evidence in the form of written statements from five other All City Electric employees. In four of these statements, the employees state that they were told that the company had future employment opportunities available for each of them if they were willing to travel. According to the statements of the other two employees, they were asked, apparently when they were first interviewed or hired, whether they would be interested in working for the company in the future, either locally or outside the area. None of this "evidence" establishes that any of these employees were actually offered employment with All City Electric for the period after the project is completed or that the employees accepted any future offer of employment. The Union's proffered evidence also does not establish that the Employer ever mentioned any specific projects or that the Employer has any additional jobs lined up within the Union's geographical area. Thus the proffered evidence is speculative, and at most, would establish that All City Electric was simply attempting to ascertain who might be interested in working for the Employer if it secured new work in the area or if it subsequently needed employees who would travel outside the Union's geographical area to other projects. Thus, even assuming that the employees testified consistent with their written statements, I find that the evidence would not establish that these employees had a reasonable expectation of future employment with All City Electric within the geographical scope of the petitioned for Unit after the Winco Foods Project was completed. As previously discussed, the record evidence demonstrates that All City Electric does not have any other projects located in the geographical scope of the petitioned for Unit, and it has no pending bids in that area.

CONCLUSIONS AND FINDINGS

1. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Mescor, Inc., a California corporation with a principal place of business located in Diamond Springs, California, is engaged in the business of employment leasing and development. Within the previous 12-month period, Mescor, Inc. has received gross revenue in excess of $50,000 from sales of service directly to customers located outside the State of California. Sierra Mountain Electric Co., Inc. d/b/a All City Electric, a California corporation with a principal place of business located in Diamond Springs, California, is engaged in the business of electrical contracting. Within the previous 12-month period, All City Electric has purchased in excess of $50,000 worth of material directly from suppliers located outside the State of California.

The parties further stipulated, and I find, that the Joint Employers are engaged in commerce within the meaning of the Act and I find that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Joint Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated that the following employees of the Joint Employers constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time electricians and electrician helpers, including technicians, mechanics 2, mechanics 1, and helpers employed by the Joint Employers in Fresno, Madera, Kings, and Tulare counties; excluding office clerical employees, guards, general foreman, foremen, and supervisors as defined in the Act.[7]

ORDER

IT IS HEREBY ORDERED that the petition in the above-captioned matter be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102,67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 26, 2004.

DATED AT Oakland, California this 12th day of March, 2004.

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Alan B. Reichard,
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
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[7] Because I am dismissing the petition in this case, I find it unnecessary to decide whether the petitioned for unit is an appropriate unit pursuant to the Board's decision in *Basha's, Inc*. 337 NLRB 710 (2002).